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BEFORE THE BOARD OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, v. UTAH DIVISION OF OIL, GAS & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent/Intervenors.	**UTAH DIVISION OF OIL, GAS & MINING'S MOTION AND MEMORANDUM TO STAY BRIEFING REQUIRED BY THE SUPPLEMENTAL ORDER, CLARIFY ISSUES TO BE BRIEFED, AND ESTABLISH A SCHEDULE FOR FURTHER PROCEEDINGS** Docket No. 2009-019 Cause No. C/025/005

The Utah Division of Oil, Gas, and Mining (Division), by and through its undersigned counsel, hereby moves the Utah Board of Oil, Gas and Mining to stay the briefing required by its November 3, 2014 Supplemental Order, clarify the issues to be briefed, and set a schedule for further proceedings in this matter.

Under the Board's November 3, 2014 Supplemental Order, the parties are to brief the issue of whether ACD can recover fees "if the Board finds that some but not all of the seventeen claims have been brought in objective bad faith." Supp. Order at 5 Unless the parties could agree to an alternative schedule, Alton was to file its Brief within 14 days (no later than November 17, 2014) and the Division and Sierra Club were to file responsive briefs seven days later (presumptively, November 24, 2014).

The parties have not been able to agree on an alternative schedule due in part to desires to have the Scheduling Stipulation address additional questions that were raised by the Sierra Club's Petition for a Writ of Extraordinary Relief, Alton's and the Division's Responses to the Petition, and the Board's Response and its Supplemental Order. Additionally, Sierra Club has now filed an Amended Petition for Writ and responses have not yet been filed that may raise additional questions.

These subsequent developments have brought to the surface complications that were not apparent when the Board issued its September 25, Order Concerning Renewed Motion for Leave to Conduct Discovery and the November 3, Supplemental Order. The parties have tried to resolve these additional issues through a Scheduling Stipulation but have not succeeded. It now appears that the Board may need to provide clarification and guidance.

The issues that have arisen are:

1. Should the parties proceed with briefing of any issues prior to the final disposition of Sierra Club's Rule 19 Petition for a Writ for Extraordinary Relief?

2. What is the legal standard that should be applied to determine if the objective element of Rule B-15 has been satisfied?

3. Should the parties brief the facts and arguments that would support an "objective finding of bad faith"[1] based on the existing record prior to the Board undertaking such deliberations?

4. When and how should the Board address the request for discovery to demonstrate objective evidence of bad faith?

5. When should the parties brief the question of a right to recover fees if there is a finding that some but not all of the seventeen claims to have been found to satisfy the objective element of Rule B-15?

This motion is based on the arguments in the Memorandum filed herewith. A proposed Scheduling Order consistent with the Division's Motion is attached. The Sierra Club has indicated it is not opposed to this proposed scheduling order.

ARGUMENT

1. The parties should not proceed with briefing of any issues prior to the final disposition of Sierra Club's Petition.

The Utah Supreme Court has not responded to Sierra Club's original Petition for Writ for Extraordinary Relief filed October 15, 2014. The time allotted for filing responses to the Amended Petition for a Writ filed November 20, 2014 has not elapsed. Responses to the original Rule 19 Petition raised issues and arguments that had not been presented in the briefing to the Board. It is entirely possible that Reponses to the Amended Petition will raise new issues or that the Court will enter into the dispute in some manner. This uncertainty will be removed by the

[1] The term "objective bad faith" has crept into the discussion of Rule B-15. Correctly it refers to an objective standard for determining if pleadings were made in bad faith. The Division prefers the terms objective test of bad faith or objective element of the B-15 Rule.

Courts disposition in the very near future. If the Petition is declined, briefing can commence without further order of the Board once a decision is announced. If the court takes up the matter, and requires additional briefing the parties will not have wasted their time. This motion and any proposed Scheduling Order must assume that the Supreme Court's action on the petition does not address or alter the issues to be briefed. If it does, the Scheduling Order will need to be revisited.

None of the parties are currently being harmed or prejudiced by a delay in the resolution of the issues in this case. Coal is being mined and no one is in immediate need of restitution of their expenses. On the other hand, this case raises important issues of first impression that justify careful deliberation. The Board has indicated that it is very busy and has only a little free time each month to consider the issues presented by this case. No briefing can be completed prior to the December Board hearing which in any case is already very full with cases and proposed rulemaking to consider. To avoid wasting time with briefing that may need to be revised, and allow for careful and thorough briefing, the Board should not require briefing to proceed until the Supreme Court makes a final disposition of the Petition

2. The parties should first brief and the Board should first decide the legal standard for determining if the objective element of Rule B-15 has been met.

The Board's Supplemental Order was clear that Rule B-15 has an both a subjective and an objective element. Although the Order referenced with approval the federal rules, federal case law, and state rules and case law to support this conclusion, the Board did not make it clear what law or standard should be used to determine if this objective element is satisfied. The cases referenced by the Board were gathered from wide variety of statutory and legal authorities and

circumstances, but the Board did not identify one line of cases as one to govern the determination of objective element of bad faith in this case.

Alton, in its Response to Sierra Club's Petition for Writ of Extraordinary Relief, argued that the Board should be given time to interpreted its Rule B-15 and that the Board had not yet determined what objective standard governs a finding of bad faith. Alton argued that "'objective bad faith' may simply mean that petitioners lost." Alton's Response to Sierra Club's Petition for Extraordinary Relief at 10.

The Division does not agree. The parties do agree that this threshold issue needs to be briefed and decided by the Board before proceeding with subsequent inquiries. A Scheduling Order should require that the parties file simultaneous briefs on the issue of B-15's objective standard thirty (30) days after a final disposition by the Supreme Court and filing of any reply briefs not more than 15 days later.

3. The parties should first brief the arguments for finding objective evidence of bad faith based on the existing record and the Board should first decide if there is objective evidence of bad faith based on the record, the briefing and other investigation as it deems appropriate before it considers if there is reason to authorize discovery.

A. The Board should cease further determinations of record for objective evidence of bad faith until briefing has been completed.

The Supplemental Order states "[t]he Board is presently analyzing whether objective bad faith can be shown with respect to any of the seventeen claims tried in the merits phase of this case". This was not an understanding shared by the Division and apparently was also a surprise to Alton. *See* Alton's Response to Petition at 9. While it may have been the Board's opinion that

the issue could be addressed while other issues are briefed, and although the Sierra Club has argued that this question was fully briefed, Alton claimed that the issue had not been briefed in its Response to Sierra Club's Petition.

This confusion is based on a lack of clarity in Rule B-15 about what sort of pleading is required. The Board should clarify this requirement by asking that Alton to set out in detail its claims and the basis for those claims and then require Sierra Club and the Division to respond. If a reply brief is requested and appropriate the Board could allow one. The Board should not undertake further *sua sponte* deliberations until briefing is complete. Alton is the petitioning party and Alton bears the burden of establishing bad faith, not the Board.

Proceeding to decide the issue without briefing is not necessary, wastes the Board's time, and deprives all of the parties of the opportunity to present their arguments. It will result in all parties asking for the opportunity to present their arguments later and result in repetition of the effort. The requirement for Alton to set forth its claims and for Sierra Club to respond will most effectively and efficiently ferret out the weaknesses and strengths of each party's positions.

B. The Board should decide if there is objective evidence of bad faith before considering if discovery is appropriate.

The Supplemental Order states: "Once its deliberations are complete, the Board will announce if it has been able to reach a conclusion on whether the existing record supports a determination that any of the seventeen claims were brought in objective bad faith, and whether it believes any discovery would be proper to aid in that determination." Supp. Order at 5. This statement suggests that the Board desires to proceed in a careful step-by-step fashion and to make an initial determination prior to authorizing discovery. However, the Supplemental Order

also "directs ACD to generate its discovery requests, for Sierra Club to make its objections, and for the parties after making reasonable efforts to resolve any disputes . . . to file any motion with respect to disputed discovery issues . . . . After the discovery requests, objections and motions are made, the Board *may* stay further discovery while it analyzes both the objective bad faith as well as any discovery disputes." *Id.* at 6 (emphasis supplied). These two statements are inconsistent and unclear. The Board should clarify that discovery disputes will not be addressed until it makes a decision on whether the existing record supports an objective finding of bad faith and if not the parties will then brief the question as to how discovery may aid in that determination.

A Scheduling Order requires that further briefing regarding the appropriate use of discovery to show objective evidence of bad faith only be addressed after the Board determines if Alton has failed to demonstrate such evidence of bad faith for a particular claim.

4. Briefing of the right to recover fees if there is a finding that some but not all of the seventeen claims have been brought in bad faith is not necessary until the Board determines there is both objective evidence of bad faith and evidence of subjective bad faith.

This issue was requested by the Board in the Supplemental Order "[t]o aid the Board in its objective bad faith analysis of the seventeen claims." *Id.* at 5. However, the only reason to brief this question prior to finding at least one of the claims was brought in objective bad faith, would be if Rule B-15 required that all of the claims be brought in bad faith. Alton has not alleged that all of the seventeen claims of error were asserted in objective bad faith and has only identified some that it says were without merit. If Sierra Club had intended to argue that all of the claims must be in bad faith they would have made that argument in their motion to dismiss.

It may be important to brief the Board on how to apportion an award fees if it finds some claims were brought in bad faith, but that would be at the end of the case after a finding that some claims met the B-15 standard. A brief survey of the wide variety of bad faith cases suggest that such awards are very fact dependent, and a briefing of such a question based on a variety of theoretical assumptions concerning the type of objective and subjective good faith involved will be burdensome and not very usefulIn short, it is the opinion of the Division that briefing this issue prior to a finding of objective evidence of bad faith is premature and speculative.

How Rule B-15 should be applied to petitions that contain both good faith and bad faith claims can wait until a finding that there are some claims that are satisfy both the elements of the Rule.

SUBMITTED this 26th day of Novemeber, 2014.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing **MOTION AND MEMORANDUM TO STAY BRIEFING REQUIRED BY THE SUPPLEMENTAL ORDER, CLARIFY ISSUES TO BE BRIEFED, AND ESTABLISH A SCHEDULE FOR FURTHER PROCEEDINGS** was delivered to the following persons at the addresses shown, this 26th day of November, 2014 or by email to the latest email address.

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